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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 931

JAMES S. RAIDY,
Petitioner,

v.

UNITED STATES OF AMERICA
AND
BETHLEHEM STEEL COMPANY,
Respondents.

BRIEF OF BETHLEHEM STEEL COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Daily Record Co., Baltimore 1, Md.

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POSITION OF THIS RESPONDENT

Petitioner sued the United States of America in the District Court for the District of Maryland, in admiralty. The United States impleaded Bethlehem Steel Company under Admiralty Rule 56, which provides with respect to a Respondent-Impleaded: "* * * such suit shall proceed as if such vessel or person had been originally proceeded against * * *. By virtue of this provision Bethlehem Steel Company is properly a Respondent in this Court.

THE OPINIONS BELOW

The opinion of the District Court is reported at 153 F. Supp. 777. The opinion of the Court of Appeals is reported at 252 F. (2d) 117. Both Courts resolved all factual and legal issues in favor of the United States.

QUESTIONS PRESENTED

I. Was the United States negligent? If so,

   A. Was its negligence the proximate cause of the accident?

II. Was the vessel unseaworthy? If so,

   A. Was its unseaworthiness the proximate cause of the accident? If so,

   B. Is Petitioner, a shipyard worker engaged in major structural repairs, entitled to recover for such unseaworthiness?

STATEMENT OF THE CASE

Petitioner's "Statement" is incomplete and inaccurate in important respects. In particular he states repeatedly that he fell through "a hole in the walkway due to a missing plate". He fails to explain that the shipyard was required by its contract with the United States to remove the plate, and that it had been removed to facilitate the installation of the "mixing well" which Petitioner himself was helping to install.

Petitioner also seeks to give the impression that there is no question as to the inadequacy of the lighting at the place of the accident. However, this was, and is, a bitterly contested factual issue.

For these reasons, and for the reason that the fundamental questions presented in this case are factual rather than legal, this Respondent feels it necessary to develop the facts in detail as established by the testimony.

Vessel Was Undergoing Major Structural Repairs and Conversion.

The "Goethals" is a large vessel resembling an ocean-going tanker. At the time of the accident it was in Bethlehem's yard (specifically, in drydock) undergoing a major overhaul and conversion which cost about $600,000 (R. 3a, 41). The vessel was in the yard from September 14, 1954, to December 9, 1954, and from October 25 to November 7 was in the largest drydock (R. 1a, 20). *It was testified without contradiction by the chief government inspector that this type of work is not normally performed by the crew, since it is beyond their physical capability* (R. 3a, 41). In fact only five shipyards on the East Coast can handle such a job (R. 3a, 37).

Both the overhaul and the conversion required drydocking (R. 3a, 42). The former included removal of propellers and shafts and opening of all sea valves, shutting down the power plant, rebuilding the boilers, opening up the turbines, and overhauling all dredge pump machinery and auxiliaries (R. 3a, 31-2).

The conversion involved a complete change of function of the dredge from one which stores its sludge until it can later be dumped in a spoil area, to one which mixes the mud with water and immediately regurgitates it. This required the installation of a number of "mixing wells". These were steel boxes 8′ x 8′ x 25′ fabricated ashore by Bethlehem and set through the main deck into the "hoppers" (comparable to the holds of an ordinary vessel).

This required the cutting of the main strength members of the vessel (including the center line girder for a distance of 180 feet) and the cutting of two 5′ x 5′ holes in the bottom of the ship for the installation of new sea valves (R. 3a, 32).

Petitioner's Work Cannot be Performed by Seamen

Petitioner was a "shipfitter", a specialist in ship construction found only in a shipyard (R. 3a, 21). At the time of his fall one of the wells had been set in place, and he was helping another shipfitter to straighten up the top where it protruded above the deck (R. 1a, 11). *By the uncontradicted testimony this particular job is performed exclusively by shipyard personnel* (R. 3a, 41), *and the members of the crew are not trained to do it* (R. 3a, 44).

Plate had been Removed as Part of the Job

Petitioner fell through a walkway at a point where one of the 3′ x 2′ steel floor-plates had been removed. Bethlehem was actually required by its contract to remove and replace all of these plates, which had become worn after sixteen years' use (R. 3a, 35-6; 42; 43).

Furthermore the plates were intended to be removable so as to give access to the piping under the walkway, and they are frequently so removed (R. 1a, 7; 18). At the time of the accident about six of the plates in the 180 foot length of this walkway had been unbolted and were leaning against the railings at approximately 30 foot intervals (R. 3a, 22; 40; 49). This was necessary because some large pipes under the walkway had to be cut out in order to install the wells (R. 1a, 17; E. 36-7). *It is thus apparent that the removal of the plate in question was an integral*

part of the very job which the United States had employed Bethlehem to perform. In fact during a large part of the contract period there were no plates at all on the catwalk (R. 3a, 39).

Petitioner Should Have Known That the Plate Had Been Removed

Petitioner was definitely not injured as the result of an unknown or unusual danger. Quite the contrary. The hazards which he faced were those which all shipyard workers face every day by the very nature of their work. He had worked on the ship before October 27, 1954 (R. 1a, 24), and knew the condition it was in. When he reported for work at 4 P. M. on that date, he was on the main deck (R. 1a, 59; R. 3a, 50), where the walkways were located. Fifteen minutes before the accident he came back on the deck from a hopper and worked on the catwalk until he fell (R. 1a, 18). He knew that the plates were removable and were frequently removed (R. 1a, 37).

Petitioner's witness Henneman — the man with whom he was handling the chalk line — admitted that he knew at the time that six or seven plates had actually been removed, *including the very plate in question* (R. 3a, 22-3). This should have been obvious to anyone, he said (R. 3a, 23), but it was also "quite possible" that he said something to Petitioner about it (R. 3a, 25). Petitioner's leader, Myers, testified that when the men reported to him on deck at the beginning of the shift, he saw that the plates were turned up (R. 3a, 49-50). The chief government inspector, Burnett, also knew that the plates had been removed (R. 3a, 39-40). In view of this evidence Petitioner's testimony that he did not know the plates were off is incredible.

Lighting Conditions Were Entirely Adequate

Petitioner's description of the light conditions at the place of the accident is greatly exaggerated. The Petition states (p. 3) that the District Court found as a fact that the lighting was "very poor". The opinion does not say so (R. 1a, 64). The only basis for this statement is Judge Chesnut's reference to the testimony of one witness to this effect. However, in the next two sentences the Court shows that he did not believe Petitioner's testimony that the lighting was so inadequate that he had to use a flashlight.

Petitioner's fellow-worker and chief fact witness, Henneman, testified that at the time of the accident it was "dusk" (R. 1a, 9-10) and he had not required any lights (R. 3a, 18). Moreover, he said that he or any other workman could have asked the shipyard electrician for additional lights at any time and gotten them "quickly at the required spots" (R. 3a, 18; 51). *It is uncontradicted that Petitioner himself could have ordered lights if he thought the illumination was insufficient* (R. 3a, 20).

There are numerous glaring inconsistencies in Petitioner's testimony about the lights. He said he asked his leader, Myers for more light (R. 1a, 25; 34) (although he could have ordered it direct from the electricians if he had really needed it). Myers denied having any such conversation (R. 3a, 48) and specifically said that no one had complained about the lights (R. 3a, 51). In fact Petitioner's own witness, Henneman, also admitted that Petitioner did not mention insufficiency of lights (R. 3a, 18).

Petitioner said that when he complained to his leader, he was told to use his flashlight because it was a hurry-up job (R. 1a, 34). Myers denied telling Petitioner any such thing and said he never knew that the man had a flash-

light (R. 3a, 48; 51). This is corroborated by the testimony of Petitioner's witness Simms who was working in the hopper where Petitioner fell. He said that the *flashlight fell out of Petitioner's pocket as he lay there* (R. 1a, 22). From this it is perfectly obvious that he could not have been using it before he fell, which in turn strongly negatives his claim of insufficient light. The District Court naturally noted this (R. 1a, 64).

Petitioner's description of the extension light in use at the scene of the accident is particularly at odds with the facts. At first he testified that there were no lights on the ship at all. The nearest lights, he said, were on the drydock wall 30-40 feet away (R. 1a, 25). Later he reversed himself completely and described a 300-500 watt light only 15 feet away on top of the mixing well (R. 1a, 60).

A 300-500 watt bulb gives off a great deal of light at 15 feet. Henneman, the co-worker, said there was sufficient light to use the chalk line, which is a piece of string one-sixteenth of an inch in diameter (R. 3a, 21-2). Myers testified that he was only 5-10 feet from Petitioner when he fell (R. 3a, 48), and that he was having no difficulty in reading graduations of *one-sixteenth* inch on a carpenter's rule he was using (R. 3a, 48-9). Under these conditions it is inconceivable that Petitioner had insufficient light to see a 3' x 2' hole in the catwalk.

The Lighting Condition Was Not the Proximate Cause of the Accident.

Any causal connection between the light conditions and the accident was negatived by the fact that when he fell into the hold he was walking *backward* and was looking upward and not down at the walkway where he was stepping (R. 1a, 26-7, 36). No such causal connection was found by the trial court.

In this connection it is significant that a large staging five feet high, and taking up almost the entire width of the walkway, had been placed by the shipyard adjacent to the hole on the side nearest to Petitioner (R. 1a, 12-3, 57; R. 3a, 50). He actually had to "climb" around it (R. 1a, 35-6; R. 3a, 22-3). Whatever its purpose, the staging could scarcely have been improved upon as a barricade to prevent people from falling into the hole. However, Petitioner, climbing around it backwards and looking up at his string rather than down at the catwalk behind the staging, managed to step into the hole. His fellow-worker, Henneman, on the other hand, had had no difficulty in seeing the missing plate on the other side of the staging (R. 3a, 22-3).

Petitioner made much of some testimony that after the accident a light was placed directly over the hole. This testimony was objected to and clearly should have been excluded (R. 3a, 19). Later, objections were sustained to the same questions, and the District Court conceded that they violated "the ordinary rules of evidence" (R. 1a, 56; R. 3a, 26-7).

Bethlehem paid the Petitioner compensation for temporary total disability under the Longshoremen's Act until his return to work (Tr. 309). It also paid his medical expenses. He is, of course, still eligible for permanent disability benefits (if he suffered a permanent injury).

ARGUMENT

I.

This Court Should Not Review the Findings of Fact of the District Court Which Were Unanimously Concurred in by the Court of Appeals.

The Petition states (p. 13) that: "This is not a case where the important facts were disputed * * *." On the

contrary, many, if not most, of the important facts were disputed. For example, there was a hopeless conflict in the testimony regarding the adequacy of the lighting conditions. Petitioner's references (pp. 2, 13) to "uncontradicted" evidence of "unsafe conditions" are simply fanciful.

Petitioner states (p. 13) that he is "not asking the Court to re-examine fact findings of the lower Courts". Despite his protestations, however, that is exactly what he wants this Court to do. Petitioner would like this Court to hold that a shipyard worker can recover for unseaworthiness, even though he is not performing a seaman's work. However, before reaching that question of law the Court would have to find as a matter of fact (1) that the owner was negligent, or (2) that the vessel was unseaworthy, and (3) that the negligence and/or unseaworthiness was the proximate cause of the accident.

The District Court (R. 1a, 62) prefaced his recital of the facts with the following statement: "From the evidence in the case I find the following relevant and important facts". After reciting the facts the District Court stated his conclusion as follows (R. 1a, 64):

> "On these facts and in the circumstances stated I find and conclude that (a) there was no negligence on the part of the shipowner causing or contributing to the libelant's injuries, and (b) the ship at the time was not 'unseaworthy' ".

The issues were thus basically factual.

Having found that the United States was not negligent and that the ship was not unseaworthy, the Court might have dismissed the libel without more discussion, but he chose to proceed with a further discussion as to whether the Libelant was one of that class of workers who is entitled to recover for unseaworthiness. He concluded that the Libelant had no such right. However, this discussion

and conclusion was not necessary to the Court's decision, since his findings on negligence and unseaworthiness completely disposed of the libel.

The Court of Appeals unanimously concurred in Judge Chesnut's findings and conclusions. This Court has frequently stated its unwillingness to reconsider factual issued concurred in by the District Court and the Court of Appeals. For example, the following statement was made in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U. S. 271, 275 (1949):

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

We submit that this rule should be applied here.

II.

This Case Presents No Conflict With the Decisions of This Court.

Petitioner attempts to develop some inconsistency between this case and *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946), *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406 (1953) and *Alaska S. S. Co. v. Petterson*, 347 U. S. 396 (1954). Exactly the same contention was made in the petition for writ of certiorari in the very similar case of *Berryhill v. Pacific Far East Line* 238 F. (2d) 385 (C. A. 9, 1956), but that petition was denied. 354 U. S. 938 (1957). If there was no conflict between *Berryhill* and the *Sieracki, Hawn* and *Petterson* decisions, then the instant case represents no conflict either.

As previously pointed out, the courts below had to decide (1) whether the United States was negligent, and (2)

whether the ship was unseaworthy. These issues having been resolved against Raidy, there was no necessity for considering whether he was a type of worker who could recover for unseaworthiness. It is therefore most surprising to find that the Petition consists chiefly of an argument that this Court should review what is, strictly speaking, only a dictum of the court below dealing with the status of the Libellant.

Actually the comments of the courts below on Raidy's status as a Libellant are in complete accord with the *ratio decidendi* of the three cases in this Court referred to above. From numerous references in the opinion of Mr. Justice Rutledge it is entirely clear that the Sieracki decision was based upon the proposition that, for some purposes, a longshoreman is "a seaman because he is doing a seaman's work" (p. 99). At page 96 it is stated that: "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew". Similar statements from previous decisions of the Court are quoted at pages 98 and 99. In a vigorous dissent Chief Justice Stone pointed out the very real differences between a longshoreman's problems and those of a seaman.

In the *Hawn* case Mr. Justice Jackson, writing the dissenting opinion for himself and two other Justices, developed in detail the historical and legal differences between the employment of a seaman and that of a longshoreman. Although the majority adhered to the *Sieracki* decision, the opinion of Mr. Justice Black makes it clear that the rationale of the decision was Hawn's connection with the loading of the ship. At page 412-3 he said:

> "Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of

> seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt."

Adhering carefully to the test established in *Sieracki* and reaffirmed in *Hawn*, Judge Chesnut made the following important finding from the evidence (R. 1a, 68):

> "In the instant case the libelant shipyard worker was performing duties not within the competence or the traditional or customary activities of the crew. His status therefore was very different from that of a seaman. The ship was in drydock for structural changes which could not have been performed by the crew."

This statement was specifically approved and adopted by the Court of Appeals (App. A, 16). This conclusion is in strict accordance with the rationale of the *Sieracki* and *Hawn* decisions.

The *Petterson* case was not concerned with the status of the Libellant (a longshoreman) as a person entitled to recover for unseaworthiness. This Court apparently found no conflict between it and *Berryhill*. Indeed, any inconsistency between them would have been most surprising, since both cases came up from the Court of Appeals for the Ninth Circuit. The instant case bears exactly the same relation to *Petterson* as did *Berryhill*. Furthermore, it must be born in mind that, whatever the effect of *Petterson* upon the "surrender of control" doctrine, this doctrine and the *Petterson* decision involve unseaworthiness only. The extent of surrender of control of the vessel still plays an important part in negligence cases. This will be further discussed below.

III.

This Case Presents No Conflict Between the Circuits as to Petitioner's Right to Recover for Unseaworthiness.

The Courts of Appeals of several circuits have decided cases similar to the case at bar, and each decision has been adverse to the shipyard worker engaged in major structural repairs or conversion work. The Ninth Circuit's decision in *Berryhill* has already been referred to. In *Berge v. National Bulk Carriers Corporation*, 251 F. (2d) 717 (C. A. 2, 1958), the Second Circuit reached the same result even though the vessel was not in drydock, as it was in the instant case. Judge Learned Hand, speaking for the Court, stated at page 718 that the situation was not within the doctrine of *Sieracki* and the decisions which followed it, for the following reason:

> "* * * the answer depends upon whether the work on which the plaintiff was engaged was of a kind that the crew of a vessel was accustomed to perform. Obviously there must be some limit, else the whole fabrication of a new ship would be included. We can only say that the reconstruction of a ship was not traditionally the task of the crew."

On the same day that it decided the *Berge* case, the Second Circuit decided *Halecki v. United New York and New Jersey Sandy Hook Pilots Association*, 251 F. (2d) 708 (C. A. 2, 1958), with the majority opinion also written by Judge Hand. Here the Libelant was permitted to recover because he was simply engaged in cleaning electrical equipment, which was work commonly performed by seamen. As Judge Hand pointed out at page 712, "* * * the work did not involve any structural changes in the ship, but was of a kind that was part of the crew's work, not only at sea, but when she was laid up for general overhaul." In a vigorous dissent Judge Lumbard expressed his opinion

that the case did not come within the *Sieracki-Hawn* principle because the Libelant "* * * was not doing what any crew member had ever done on this ship or anywhere else in the world, so far as we are informed."

The issue framed by the majority at page 711 (and adopted by the dissenting judge) is precisely the same as that recognized in the instant case and in *Berryhill*, *Sieracki* and *Hawn*.

> "* * * We think that the test is whether the work is of a kind that traditionally the crew has been accustomed to do, and as to that it makes no difference that the means employed have changed with time, or whether defective apparatus was brought aboard and was not part of the ship's own gear."

In addition to the above mentioned appellate decisions District Courts in two other Circuits have reached the same result in cases virtually identical with the case at bar. *West v. United States*, 143 F. Supp. 473, 246 F. (2d) 443 (E. D. Pa. 1956); *Owens v. United States*, 1958 A. M. C. 216 (S. D. Fla. 1957).

Petitioner cites *Read v. United States*, 201 F. (2d) 758 (C. A. 3, 1953) as being in conflict with the above decisions. With this we do not agree. Actually that court did not engage in any discussion of the point now under consideration but contented itself with citing its own decision in the *Hawn* case. What it did hold in *Read* was (p. 762) that the ship's appliances were defective *at the time it was turned over to the repair contractor*, so that the ship was guilty of a "failure to supply and keep in order the proper appliances appurtenant to the ship". That is not the situation here and the two cases are therefore quite distinguishable.

That the Third Circuit is in accord, and not in conflict, with the Second, Fourth and Ninth as to the legal test to be applied in these cases is evident from its later decision in *Crawford v. Pope & Talbot, Inc.*, 206 F. (2d) 784 (C. A. 3, 1953). There the libellant was a tank cleaner employed by an independent contractor. The court found (p. 790) that his "work in the deep tanks was clearly 'ship's work' within the meaning of the *Sieracki* case". Indeed it pointed out that at the very time he was injured members of the crew were similarly engaged in cleaning the adjoining tanks. It should also be pointed out that the District Court for the Eastern District of Pennsylvania, in the *West* case has interpreted *Read* as we have here interpreted it.

Petitioner also cited three dicta of the First and Sixth Circuits as allegedly representing a conflict with the decisions of other circuits. *Christiansen v. United States*, 192 F. (2d) 199 (C. A. 1, 1951); *Imperial Oil Ltd. v. Drlik*, 234 F. (2d) 4 (C. A. 6, 1956); *Pioneer Steamship Co. v. Hill*, 227 F. (2d) 262 (C. A. 6, 1955). This comparison is completely far-fetched. The *Christiansen* case was a claim by a tank cleaner for negligence. The nature of the work was clearly that of a seaman as in *Crawford*. The *Drlik* case involved a claim by a shipyard worker who was actually handling mooring lines at the time he was injured, an activity which is characteristic of seamen. In the *Hill* case the court stated only that the libellant was "probably" within the class of persons entitled to the seaworthiness doctrine. All three cases involved negligence exclusively.

IV.

This Case Presents No Conflict Between the Circuits as to the Issue of Negligence.

As Judge Chesnut recognized (R. 1a, 62), this case was tried primarily on the theory of unseaworthiness. Never-

theless, he made a complete determination of the isues by finding as a fact and concluding as a matter of law that the ship-owner was not negligent. This was chiefly a factual determination which this court should not undertake to review. However, Petitioner still attempts to create the illusion of a conflict between the Circuits on the question of negligence, and we will therefore refer to it briefly.

Petitioner claims that the United States is liable to him for failing to provide him with a safe place to work, for which it has a nondelegable duty. However, this is merely a duty to use reasonable care to provide a reasonably safe place to work and is therefore a part of the law of negligence. *Brabazon v. Belships Co.*, 202 F. (2d) 904 (C. A. 3, 1953); *West v. United States*, 143 F. Supp. 473 (E. D. Pa. 1956); *McMahon v. Panamolga*, 127 F. Supp. 659 (D. Md. 1955). It is not an absolute duty imposed upon the ship-owner, as is the duty to provide a seaworthy ship.

In this field it may be of crucial importance whether the owner has relinquished complete control of the vessel to the shipyard. The *Petterson* case has no bearing upon this problem, since it involved unseaworthiness and not negligence. We know of no case holding an owner liable for failure to provide a safe place to work to an employee of an independent contractor where (1) complete control of the ship was relinquished and (2) at the time of relinquishment the ship and its appliances were safe and seaworthy in all respects. Petitioner has never cited any such case.

As good an illustration as any other of the validity of this proposition is a case strongly relied upon by Petitioner on another point. *Pioneer Steamship Company v. Hill*, 227 F. 2d 262 (C. A. 6, 1955). There the Sixth Circuit held that the determination of negligence *vel non* depended entirely upon the question of whether or not the

owner had surrendered general control and supervision of the ship to the repair yard. The District Court found that such control had not been surrendered, and the Court of Appeals accepted this "crucial finding" on the ground that it was not clearly erroneous, even though the Appellate Court might have drawn a different inference from the evidence. The District Court stated the basic legal proposition as follows (134 F. Supp. at 368):

> "It is indisputable that the shipowner is not liable in negligence unless it is established that it had control of the vessel at the time of the charged negligence."

In the longshoremen cases (and in some shipyard cases) the owner surrenders to the independent contractor control of only a part of the ship. In the instant case the vessel had been completely turned over to the shipyard by the United States, at which time it had no defects. The District Court and the Court of Appeals duly noted these facts and held, both as a matter of fact and as a matter of law, that the United States was not liable in negligence to the Libelant.

There is no conflict among the Circuits on this point. As a matter of fact, the opinion of the Ninth Circuit in *Petterson* carefully pointed out that in negligence cases the owner's relinquishment of "complete control" may be important. 205 F. 2d at 479. Petitioner cites no cases representing a conflict but simply quotes, out of context, statements from *Halecki* and *Feinman v. A. H. Bull S. S. Co.*, 216 F. 2d 393 (C. A. 3, 1954). These cases are not inconsistent with the decision below, since in each of them the owner retained general control and supervision of the ship, relinquishing only a limited control to the contractor. *Halecki* held on this issue simply that the negligence of

the owner was for the jury. In *Feinman* the Third Circuit approved an instruction to the jury which was in complete accord with the proposition stated above.

CONCLUSION

In *Sieracki* and *Hawn* this Court established the following test: Was the harbor-worker doing a seaman's work when he was injured? This mandate has been carefully executed by the Courts below and those in other Circuits. Petitioner's complaint is not that they have failed to apply the correct legal principle, but rather that the application of this principle to differing fact situations has produced differing results (Pet., p. 7). This is not a sufficient ground for the granting of the Petition.

Respectfully submitted,

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